No. 16072

United States
COURT OF APPEALS
for the Ninth Circuit

TIDEWATER ASSOCIATED OIL COMPANY, a corporation,

Appellant,

v.

NORTHWEST CASUALTY COMPANY, a corporation,

Appellee.

BRIEF OF APPELLEE

Appeal from the United States District Court for the District of Oregon.

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COURT RULES

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JURISDICTION

This is an action on a policy of liability insurance commenced in the Circuit Court of the State of Oregon for Multnomah County, by Tidewater Associated Oil Company, a Delaware Corporation against Northwest Casualty Company, a Washington Corporation. The amount in controversy, after excluding interest and costs, is more than $3000. The action was removed to the United States District Court for the District of Oregon upon defendant's petition. The District Court

had jurisdiction under 28 USCA Sec. 1332 and 28 US CA Sec 1441.

Findings of Fact, Conclusions of Law and Judgment in favor of appellee were entered. This court acquired jurisdiction under 28 USCA Sec. 1291.

STATEMENT OF THE CASE

Appellee executed and delivered to William Sherer a "Comprehensive Public Liability" policy of insurance with appellant Tidewater Associated Oil Company as an additional named insured, which policy was at all times in force.

On December 1, 1953 Ruth Buffington ordered some stove oil from Sherer and the same was delivered to her by truck the next day and put in a can which she provided. This can was placed on the back porch of her residence.

On December 3, 1953 she attempted to start a wood fire with the product delivered by Sherer and the same exploded, causing her personal injuries and property damage.

On September 12, 1955 she served upon appellant and others, a summons and complaint, in an action for the recovery of damages caused by the explosion and she alleged negligence and also breach of warranty.

Appellent tendered the defense of said action to appellee and it denied coverage under its policy and declined to defend.

Appellee's policy of insurance, in part, reads as follows (Findings of Fact IX, Tr. 38-39):

EXCLUSION OF PRODUCT LIABILITY

(EXCLUSIONS (A) AND (B) BELOW ARE APPLICABLE WHEN CHECKED.)

(X) (A) BODILY INJURY
It is agreed that the policy does not apply to bodily injury, sickness or disease, including death at any time resulting therefrom:

(X) (B) PROPERTY DAMAGE
It is agreed that the policy does not apply to injury to or destruction of property (including loss of use of such property):

if caused by the handling or use of, or the existence of any condition in goods or products manufactured, sold, handled or distributed by the Insured when the occurrence takes place away from the premises owned, rented or controlled by the Insured, and after the Insured has relinquished possession of such goods or products to others or if caused by operations if the accident occurs after such operations have been completed or abandoned at the place of occurrence (other than pick up and delivery, and the existence of tools, uninstalled equipment, and abandoned or unused material); provided, operations shall not be deemed incomplete because improperly or defectively performed or because further operations may be required pursuant to a service or maintenance agreement.

Subject, otherwise, to all the terms and conditions of the policy.

Attached to and hereby made a part of policy No. 880-7277 of the Northwest Casualty Company, of Seattle, Washington.

Appellant was also insured by a policy of insurance issued by Continental Casualty Company who, through some loan agreement with appellant, did employ counsel and settled the Buffington lawsuit against appellant and others for the sum of $15,000. Attorney's fees and costs expended amounted to $1010.73 (Findings of Fact X, Tr. 39-40).

This action was brought to recover the sums paid in settlement, plus costs and attorney's fees.

QUESTIONS PRESENTED

The principal question is whether appellee breached its contract in refusing to defend appellant in the action brought by Buffington. Appellee contends that the obligation to defend does not arise where the gravamen of a complaint against the assured relates to a claim which is clearly outside the policy coverage.

Another question involves the provision in the policy, "liability imposed by law" as it pertains to the payment of $15,000 by appellant through Continental Casualty Company, in settlement of the Buffington claim.

SUMMARY OF ARGUMENT

The allegations of the Buffington complaint related to a claim for injuries and damages clearly outside the coverage of the policy issued by appellee.

Under a comprehensive liability policy requiring insurer to defend suits brought against the insured, but only as to coverage of the policy, which excludes therefrom injuries or damage caused by handling or use of a product, the insurer is not under a duty to defend or pay amount which insured voluntarily paid to settle claim.

Appellant was not obligated by law to pay Buffington $15,000, and under the terms of the policy, appellee is not liable to it for such voluntary payment. Liability imposed by law means liability imposed in a definite sum by a final judgment against the insured.

ARGUMENT

POINT I

The Buffington claim was clearly outside the insurance coverage and for that reason there was no duty on the part of appellee to defend.

Appellant contends that the allegations in the Buffington complaint, even though they may refer to a claim partly within and partly without policy coverage, appellee, none the less, had the duty to defend.

The obligation to defend an action against the insured does not arise where it appears from the gravamen of the complaint that the claim is clearly outside the coverage. This conclusion was reached in the recent case of *MacDonald v. United Pacific Insurance Company,* 210 Or. 395, 311 P. 2d 425, where the insured brought an action against the defendant for breach of the provisions of a Personal Comprehensive Liability

Policy. Plaintiff set forth three causes of action all based upon the policy.

In the first he alleged that as a result of an altercation he was charged with assault and battery in the Municipal Court. He pleaded not guilty and called upon the defendant to defend him in that proceeding. Upon defendant's failure to do so, plaintiff was required to and did employ legal counsel for his defense in the Municipal Court action.

By his second cause of action plaintiff set forth the same altercation and alleged that as a result thereof three parties sued him for $140,000 damages for assault and battery. Again plaintiff demanded that the defendant company defend him but defendant denied that the policy afforded any coverage and refused to assume the defense. Thereafter the plaintiff on advice of counsel settled all of said suits for the amount of $2,750.00 and they were dismissed with prejudice. Plaintiff seeks that amount from defendant.

As his third cause of action he reiterated his previous allegations and alleged that by reason of defendant's refusal to defend him he was called upon to employ counsel for his defense and incurred costs and attorney's fees in the sum of $1,590.50, for which sum he seeks judgment from the defendant.

In considering the issues raised, the Court said:

> "The plaintiff's claims against the defendant company are of two kinds. By his first and third causes of action plaintiff seeks recovery for legal expenses, costs and attorney's fees incurred by him in defending the criminal and civil actions and rendered

> necessary by reason of the alleged wrongful failure of the defendant company to assume the defense of those actions. By the second cause of action plaintiff seeks to recover the amount paid by him by way of a settlement of 'all said suits'. For the purpose of this case only, we shall treat the amount paid in settlement as being a sum which the insured plaintiff became 'obligated to pay by reason of the liability imposed upon him by law . . . for damages . . . because of bodily injury'. Coverage A. Our questions are these: (1) Was the defendant under a duty to assume the defense of the plaintiff, and (2) was it under a duty to pay to plaintiff the amount paid by plaintiff in settlement of the suits? . . .
>
> "The question now arises as to whether the defendant company breached its contract in refusing to defend the plaintiff. The duty to defend is not dependent upon the merit or want thereof in the damage suit brought against the insured. If required to defend it must do so whether the suit be valid or groundless, false or fraudulent. But under the clear wording of the policy the duty to defend applies only 'As respects such insurance as is afforded by the other terms of this schedule under coverages A . . .' Coverage A is limited by the exclusionary clause."

In this case at bar, appellee issued to Sherer, a comprehensive public liability policy which had attached to it the Exclusion of Product Liability. The duty to defend reads: "As respects such insurance as is afforded by the other terms of this policy . . ."

Whether appellee was required to defend appellant against the Buffington claim calls for consideration of the gravamen of her complaint. Both causes of action in her complaint related to personal injuries and property damage caused as a result of an explosion at the

Buffington residence by the handling or use of appellant's contaminated product.

In the first cause of action, it is alleged, that an order for stove oil was placed with appellant on December 1, 1953, and the same was delivered to the residence on December 2nd; that the plaintiff obtained a can and requested the delivery man to place a small quantity of stove oil, as ordered, in the can . . . thereupon said defendants took the hose located upon said truck and poured a petroleum product represented by said defendants to be stove oil, as ordered, in said can; thereupon, plaintiff placed said can and said contents as placed therein by defendant, upon the back porch of her home for later use in starting kitchen stove fires. The next day the plaintiff was required to start a fire in the wood stove, obtained the can which contained only the petroleum product delivered by defendants, and which plaintiff had placed on the back porch, and which had been represented to her as containing stove oil, struck a match and placed the same beneath the wood at the end of the fire box, and commenced to pour a small quantity of the petroleum product from said can upon the wood; that simultaneously, with the first small particle of the petroleum product coming in contact with the wood, the petroleum product from said can ignited and flamed with great force and exploded causing plaintiff serious injuries.

In the second cause of action, as an alternative cause, based upon breach of warranty, she alleged that defendants warranted the product sold was stove oil, but instead it was a dangerous mixture of gasoline.

Both causes of action are based on the undisputed fact that plaintiff had received complete possession of the alleged stove oil in a can provided by her and the same was placed upon the back porch of her home for later use.

Thus, there can be no dispute, the delivery of the product from the truck had been completed and no harm resulted therefrom. The harm to Buffington resulted solely from the *handling* or *use* of an alleged contaminated product the day following its delivery to her. Upon the allegations of her complaint, therefore, no claim was stated within the coverage of the policy of insurance.

In *Remmer v. Glens Falls Indem. Co.,* 140 Cal. App. 2d 84, 295 P. 2d 19, 57 ALR 2d 1379, the court said:

> "Appellants also contend that, regardless of whether the policy covered the damage involved, respondent was obligated by the policy to undertake the defense of the appellants in the action brought against them by the Morrises. The defense clause of the policy has already been quoted. It required the respondent to defend the insured in any action alleging any injury under the policy 'even if such suit is groundless, false or fraudulent'. Under such a clause it is the duty of the insurer to defend the insured when sued in any action where the facts alleged in the complaint support a recovery for an 'occurrence' covered by the policy, regardless of the fact that the insurer has knowledge that the injury is not in fact covered. Lee v. Aetna Casualty & Surety Co., 2 Cir. 178 F. 2d 750; Employers Mut. Liability Ins. of Wis. v. Hendrix, 4 Cir. 199 F. 2d 53. But it is equally true that the insurer is not required to defend an action against the insured when the complaint in that

> action *shows on its face* that the injury complained of is not only not covered by, but is excluded from, the policy. Farmers Cooperative Soc. No. 1 v. Maryland Cas. Co., Tex. Civ. App., 135 SW 2d 1033. That is the present case."

In *Journal Publishing Co. v. General Cas. Co.*, 210 F. 2d 202, the Ninth Circuit Court of Appeals said:

> "There are also decisions in which the insurer has been held liable to the insured both to satisfy the liability to the third person and to defend the third person's action. In those cases the allegations of the third person's complaint disclosed *claims* within the coverage of the policy. But, as we have previously suggested, no court has held that merely because of this state of the pleadings the insurer is obligated not merely to defend but also to pay if recovery is had. In such cases the obligation of payment has been predicated upon the court's determination that as a matter of fact the liability and the damages claimed by the third person were within the policy's coverage." (Citing authorities) (Emphasis supplied).

Appellant cites *Employers Liab. Assur. Corp. v. Youghiogheny and Ohio Coal Co.* (CCA 8), 214 F. 2d 418, on the question of duty to defend. The policy there involved contained a product liability exclusion. The Court pointed out, however, that the claim arose as the result of *a defective car door* and did not result from handling the product of the insured—namely coal. Consequently the product liability exclusion was not involved and the insurance company should have defended. The facts in that case are distinguishable and are not comparable to this case at bar. If the coal car had blown up, as a result of a defective product, the exclusion would have clearly applied.

POINT II

The exclusion endorsement exempts liability for injuries caused by the "handling" or "use" of a product . . . when the occurrence takes place away from the premises of the insured.

In this regard, the Exclusion endorsement of the policy has this language:

> "It is agreed that the policy does not apply to bodily injury, sickness or disease . . . : if caused by the handling or use of, or the existence of any condition in goods or products manufactured, sold, handled or distributed by the Insured when the occurrence takes place away from premises owned, rented or controlled by the Insured, and after the Insured has relinquished possession of such goods or products to others . . ."

The above endorsement clearly exempts coverage for bodily injury or damage caused by the handling or use of or the existence of any condition in goods or products manufactured, sold, handled or distributed by the appellant.

Philadelphia Fire & Marine Ins. Co. v. City of Grandview, 42 Wash. 2d 357, 255 P. 2d 540, gave consideration to a policy of insurance with identical language as appears in this policy at bar. Appellant cites that case in its brief and fairly outlines the salient facts. That case supports appellee. In finding that the products liability exclusion was not applicable to the facts, since the City of Grandview was not manufacturing or selling gas, the Court said:

> " . . . The negligence of the city in permitting a dangerous concentration of gas to be introduced into the house is the basis of the judgment against

> the city. It is true that the gas was negligently introduced into the house by the same vehicle that delivered water to the house; but it does not necessarily follow that it thus attained the same status. *This is not a case involving the sale of a contaminated product.* It is this fact which distinguishes it from the authorities cited . . . wherein dynamite caps had been mixed with coal. . . ." (Emphasis added).

Appellant cites *A. R. Heyward, II, and C. D. Tucker, doing business as W. B. Guimarin & Co. v. American Casualty Company of Reading,* 129 F. Supp. 4. That case is clearly distinguishable. It involved a situation where the insured had a subcontract on a housing project for the plumbing and heating portion thereof, and which involved the construction of underground gas lines. Before the housing project was fully completed, a portion of it was occupied, when an explosion occurred in one of the apartments, causing personal injuries to a person, who thereafter brought action against the insured. The court found that the allegations of the complaint for injuries were clearly based upon a negligent construction, and not upon a claim relating to a defective product.

In this case at bar it should be noted, that the Exclusion endorsement reads:

> " . . . when the occurrence takes place away from the premises owned, rented, or controlled by the Insured, . . ."

The above language has been considered in the following cases:

> Loveman, Joseph & Loeb v. New Amsterdam Cas. Co., 233 Ala. 518, 173 So. 7.

Standard Acc. Ins. Co. v. Aberts (CCA 8), 132 F. 2d 794.
Farmers Co-op. Soc. v. Maryland Cas. Co., 135 SW 2d 1033.
Carter v. Nehi Beverage Co., 329 Ill. App. 329, 68 NE 2d 622.
Lyman Lumber & Coal Co. v. Travelers Ins. Co., 206 Minn. 494.

In *Loveman, Joseph & Loeb v. New Amsterdam Cas. Co.* supra, the policy involved provided that it did not cover any accident "caused directly or indirectly by the possession, consumption, handling or use, elsewhere than upon the premises described."

The party injured discussed the merits of a sun tan lotion with the plaintiff's clerk, after which the clerk delivered a preparation which was not to be used in the sun. This precaution was not observed by the injured party. The Court held that under the very clear and unambiguous terms of the policy it did not cover accidents "caused directly or indirectly by the possession, consumption, handling or use, elsewhere than upon the premises described in the schedule of statements, of any goods, article or product, manufactured, handled or distributed by the assured." The court further stated that since the accident was not caused by the possession, consumption, handling or use of the preparation given to the injured party upon the plaintiff's premises, there was, under the limitation clause of the policy, no liability upon the insurer.

In *Standard Acc. Ins. Co. v. Roberts,* supra, it appeared that the business of one of the defendants was the sale and installation of furniture and fixtures, and that

he sold a certain person a gas-operated refrigerator and installed it in the purchaser's residence, the installation being completed by coupling up the refrigerator to the gas pipes in the house; during the following night, the householder, his wife, and children were injured by gas escaping from such refrigerator connections.

After stating that it did not need to determine whether installations in residences was within the coverage, the court went on to say that even if it should be, the provision of the "Products of Completed Operations" clause, quoted above, clearly excluded the occurrence in question from coverage because it happened away from the insured's "premises;" it resulted from the existence of a "condition in premises or property caused by operations of the insured;" the accident occurred "after the completion . . . of such operations at the place of occurrence thereof and away from premises owned, rented or controlled by the insured;" and it was not caused by "tools, uninstalled equipment and abandoned or unused material."

An endorsement to the policy excluded liability for an accident occurring after the insured had relinquished possession thereof to others and away from the premises owned, rented and controlled by him, and also excluded the existence of any condition in premises or property away from those of the insured.

In *Farmers Co-op Soc. v. Maryland Cas. Co.,* supra, it appeared that the plaintiff operated a gasoline station in connection with a cotton gin, and that the person injured was a customer of the plaintiff and purchased

what he thought was a 5-gallon can of kerosene, but the container being filled by mistake with gasoline or a mixture of gasoline and kerosene, the liquid delivered was much more inflammable and explosive than kerosene, and while the customer's wife was filling a lamp with the liquid, an explosion occurred, causing her clothes to catch fire. While the husband was attempting to extinguish the flames, he inhaled flames, gases, and vapors, which irritated his throat and lungs so that pneumonia developed, resulting in his death. The court rejected the contention of the plaintiff that the "use" of the liquid purchased by the deceased began upon the premises of the plaintiff, on the ground that the policy plainly provided that it did not cover accidents caused by the use of goods handled by the plaintiff elsewhere than upon its premises.

In *Carter v. Nehi Beverage Co.,* supra, one who had recovered a default judgment in an action for personal injuries caused by an exploding bottle of pop, sought to garnish the tort feasor's public liability insurer, which denied any indebtedness to the insured as a result of the litigation in question. The complaint against the bottling company alleged that it conducted its business in Elgin and that the bottle exploded at the wayside stand of plaintiff's aunt in Wauconda. In affirming the judgment below discharging the garnishee, the court expressed doubt that the accident in question came within the insuring clauses of the policy; then observed that, assuming it did, "we are confronted by the exclusion clause which follows;" and quoted the language referred to: "This policy shall not cover loss

from liability for . . . injuries or death: . . . (4) Caused by . . . the consumption of any article or product manufactured, handled or distributed by the Assured *elsewhere than upon the Assured's premises.*"

In *Lyman Lumber & Coal Co. v. Travelers Ins. Co.,* 206 Minn. 494, 289 Ia. 40, the facts indicated that William Hullsiek ordered from Lyman Lumber & Coal Company a ton of coal which was delivered and unloaded in Hullsiek's coal shed a few days before the accident and injuries to a minor as the result of fuse caps containing dynamite delivered in the coal. The lumber company held public liability policies issued by the defendant insurance company, which policies excluded (c)

> "the possession, consumption, or use elsewhere than upon the Insured Premises of any article manufactured, handled, or distributed by the Assured unless covered hereunder by written permit endorsed on this Policy."

Hullsiek brought an action against the lumber company and alleged acts of negligence in carelessly delivering coal containing dynamite caps and failing to remove said caps or warn Hullsiek, such negligent acts being done when the assured knew or should have known that the caps were attractive to children, and that by reason of said explosion caused by its negligence the minor was injured.

The lumber company tendered the defense of the actions to the defendant insurance carrier claiming to be protected by the policies. The defendant took the position that the policies of insurance did not afford

coverage and declined to defend. The lumber company successfully defended the Hullsiek case and brought action against the insurance carrier to recover the costs expended.

The court found that the possession and use elsewhere of the coal than on the insured premises was within the exclusion provisions of the policy and that the insurer was not obligated to defend the action. It would only be bound to defend the assured against *claims* as would, if proved, *create liability* against which the insurer would be bound to indemnify the assured.

In this case at bar, the Exclusion of Products Liability endorsement has this language:

> ". . . or if caused by operations if the accident occurs after such operations have been completed or abandoned at the place of occurrence . . ."

If delivery of the stove oil purchased is regarded as an operation, such operation was concluded on December 2, 1953 when it was placed on the porch in the Buffington can, and the policy exempted coverage for the accident occurring the next day.

In *U. S. Sanitary Specialties Corp. v. Globe Indemnity Co.,* 204 F. 2d 774 (CCA 7), the court said:

> "To determine just what coverage was thus excluded from this policy we must consider the definition of the hazard, 'Products (Including Completed Operations),' which we find defined in the policy under the title, 'Definitions,' as follows:
>
> "'(c) Products Hazard. The term "products hazard" means
>
> "'(1) the handling or use of, the existence of any condition in . . . goods or products manu-

factured, sold, handled or distributed by the named insured, . . . if the accident occurs after the insured has relinquished possession thereof to others and away from premises owned, rented or controlled by the insured . . . ;

" '(2) operations, if the accident occurs after such operations have been completed or abandoned at the place of occurrence thereof and away from premises owned, rented or controlled by the insured, except . . . (b) the existence of tools, uninstalled equipment and abandoned or unused materials . . . provided, operations shall not be deemed incomplete because improperly or defectively performed . . .' "

* * *

"It also seems clear that in this case the 'operation' of the plaintiff here involved—the demonstration of its wax product by the county officials to induce a purchase of the product by the county officials—had been completed when the personal injury plaintiff slipped and fell. The small area on the floor was waxed on December 1, 1951. On December 10, 1951, as a result of the demonstration, the county officials made a purchase of the wax product, and on the following day, December 11th, the accident occurred.

"The selling of this type of wax product was a regular part of plaintiff's business. A demonstration of the product to induce purchases was a regular operation in the course of plaintiff's business. This particular demonstration was, at the time of the accident, a 'completed or abandoned' operation within the meaning of the policy definition of 'operation' given in Paragraph (2) under 'Products Hazard.' "

POINT III

Appellant was not obligated to pay Buffington for there was no liability imposed upon it by law.

Appellant is bound by the terms of the policy. The "Insuring Agreements" of the policy has this provision:

Bodily Injury and Property Damage Liability.

(1) To pay on behalf of the Insured, all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law. . . .

Appellant was not obligated by law to pay Buffington the sum of $15,000, accordingly appellee is not liable to it for the amount of such payment.

In *Girard v. Commercial Standard Ins. Co.,* 66 Cal. App. 2d 483, 152 P. 2d 509, the court held that the term "liability imposed by law" as used in an automobile liability policy is ordinarily construed to mean liability imposed in a definite sum by a final judgment. The Court stated:

> "Under the rules enunciated in the authorities cited, we cannot escape the conclusion that the policy before us 'was simply an undertaking to pay any final judgment which the injured person might obtain against the assured, and that the obtaining of such final judgment constituted a condition precedent to any action which the injured person might have against the insurance carrier.' "

To the same effect is found in *Philadelphia Fire & Marine Ins. Co. v. City of Grandview,* supra, where the Court said:

> "In order to establish its right to recover under the insurance policy, respondent must prove: (a)

that a liability has been imposed upon the city by law; (b) that the facts upon which liability was based established a situation within the terms of the policy; and (c) the amount of the judgment."

CONCLUSION

The allegations in the Buffington complaint clearly showed that her claim arose out of the handling and use at her residence of a contaminated product. This claim was outside the coverage of the policy of insurance and appellee did not have the duty to defend the action or pay the amount of the settlement made by appellant.

Appellant has not complied with Rule 18(2)(d) of the Rules of this court requiring it to set forth in its brief a specification of errors relied upon and particularly each error intended to be urged. For this reason it has been difficult for appellee to determine precisely the error relied upon by appellant in this appeal.

The judgment should be affirmed.

Respectfully submitted,

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